Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

October Term, 1995

JOHN A. YOUNG

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

The Office of Personnel Management and the administrative judge's decision denying disability retirement was not based upon all material issues of fact and law presented on the record.

(1) Why would five accommodation efforts be necessary or even considered if the statements certified by the Disability Coordinator on Form 2824D were true.

(2) Why would all position descriptions for all transfers involve tasks which required working in environments which my doctors stated were not conducive to my medical condition.

(3) If the production control position was the main focus of accommodation why was I transferred to a tunnel facility after I declined the production control position.

(4) Why were no credibility determinations made by the Merit Systems Protection Board Judge.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Federal Court of Appeals

The Merit Systems Protection Board

The Office of Personnel Management Administrative Judge

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TABLE OF CITATIONS

Cases Cited:

The Board, in Chavez-V-OPM6 MSPB 343 (1981)

made clear that the Board will review OPMs reasons

for its actions. .....cited page 5.

Statutes and Rules Cited:

5 C.F.R. § 831.502, 29 C.F.R. § 791 et. seq. .....cited page 5

5 C.F.R. § 1201.111 (b) (1) .....cited page 5

Other:

The Americans with Disabilities Act

The Uniformed Services Employment Act

The Civil Rights Act of 1964 and 1991

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

John A. Young respectfully petitions for a writ of certiorari to review the judgment, and the United States Court of Appeals affirmation, of the United States of America Merit Systems Protection Board, Washington, D.C.

OPINIONS BELOW

The decision of the United States Court of Appeals appears (App., infra) is unpublished.

STATEMENT OF JURISDICTION

The United States Court of Appeals entered its judgment on November 13, 1995. No petition for rehearing was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

If the Constitution of the United States establishes justice and promotes the general welfare and secures the blessings of liberty to its citizens, then the Civil Rights Act of 1964 and the Civil Rights Act of 1991 along with Americans with Disabilities Act must be part of my constitutional rights.

STATEMENT OF THE CASE

I was employed at NASA Langley Research Center in Hampton, Virginia, for almost fifteen years. As an engineering

technician I was unavoidably exposed to chemical fumes, dust, spray paints, adhesives, temperature and humidity changes within the workplace. I developed a chronic sinusitis condition with facial pain and repeated sinus infections along with an allergic rhinitis condition. I requested a controlled environment where I would not be exposed to such environments. I filed for disability retirement in April, 1993. The agency certified that they had accommodated my medical condition on Form 2824D. However my supervisor knew the statements on Form 2824D were not true. This fact was evident in my performance rating as well as all of my performance plans, yet I was required to work in environments not conducive to my medical condition despite repeated letters from my doctors. I was offered a production control position which I declined because of the environments associated with the position. After I declined the production control position I was transferred to another tunnel facility where I was required to work in environments of wide temperature changes, epoxy, chemical odors, spray paints, dusty areas and

high humidity. It was in this position that I was reprimanded for dozing despite my doctor's letters which stated drowsiness and sedation was due to medication I had to take. This is the position I held when terminated. The Merit Systems Protection Board Judge found that Agency Management had accommodated my medical condition by offering several positions including the production control position. The administrative judge made no determination as to who was telling the true facts as supported by the record. The Federal Court of Appeals stated that because of their limited review the decision of the board must be affirmed. However the Federal Court of Appeals stated in their opinion that I had provided evidence that all assignments offered had environmental conditions that were not conducive to my medical condition.

REASONS FOR GRANTING THE WRIT

I. This case should be reviewed to correct an unjust decision which if left unchallenged would allow veterans and individuals with disabilities to be subjected to much oppression.

II. This case should be reviewed because the federal court of appeals stated in their opinion that I had provided evidence that all of the assignments offered had environmental conditions that were not conducive to my medical condition.

III. This case should be reviewed because the decision to deny disability retirement is of absolute authority since the issues and facts were not reviewed by the MSPB or the Federal Court of Appeals. (*Chavez* V-OPM, 6 MSPB 343-1981)

IV. As a disabled veteran whose service connected medical condition was exacerbated and then terminated, this case should be reviewed.

V. The administrative judge erroneously interpreted the reasonableness of accommodation offered. 5 C.F.R. § 831.503 (b) (6) 29 C.F.R. § 791 et. seq.

VI. The administrative judge erroneously interpreted regulations in that she failed to make findings of fact and conclusions of law supported by the evidence on record. 5 C.F.R. §1201.111 (b) (1)

VII. Because of conflicting certified statements this case should be reviewed.

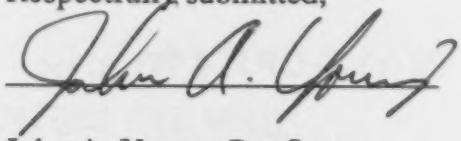
VIII. Being a federal employee for fifteen years and because the federal government provides effective enforcement of the Americans with Disabilities Act this petition should be reviewed.

CONCLUSION

I respectfully request the Supreme Court of the United States to reverse the decision denying disability retirement based upon all material issues of fact and law presented on the record and just compensation for undue hardship.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Appendix A—Affirmation of the U.S. Court of Appeals for the Federal Court—Dated November 13, 1995

No. 95-3676

Docket Number PH8-31E-94-0516-I-1

John A. Young,

Petitioner,

v.

Office of Personnel Management,

Respondent.

Appeal from the United States Merit Systems Protection Board

(June 15, 1995)

Before MICHEL, PLAGER, and RADER, Circuit Judges.

RADER, Circuit Judge.

PER CURIAM: AFFIRMED. See Fed. Cir. R. 47.6

"Costs taxed against the petitioner."

Judgment entered November 13, 1995

For the Court: Francis X. Gindhart, Clerk

ISSUED AS MANDATE: 1/4/96

Appendix A—Affirmation of the U.S. Court of Appeals for the Federal Court—Dated November 13, 1995

No. 95-3676

Docket Number PH8-31E-94-0516-I-1

John A. Young,

Petitioner,

v.

Office of Personnel Management,

Respondent.

Appeal from the United States Merit Systems Protection Board

(June 15, 1995)

Before MICHEL, PLAGER, and RADER, Circuit Judges.

RADER, Circuit Judge.

PER CURIAM: AFFIRMED. See Fed. Cir. R. 47.6

Judgment entered November 13, 1995

Mr. John A. Young appeals the decision of the Merit System Protection Board. The Board sustained the Office of Personnel Management's (OPM) denial of Mr. Young's application for a

disability retirement annuity. Because the Board applied the correct legal and procedural standards, this court *affirms*.

DECISION

Mr. Young worked at NASA Langley Research Center in Hampton, Virginia, as an Engineering Technician. Mr. Young suffers from chronic sinusitis and allergic rhinitis. These conditions are affected by changes in the environment, dust, and fumes from spray paints, adhesives and other chemicals. Because of these conditions, Mr. Young could not work in his current position.

An employee is entitled to disability retirement if, upon completion of at least five years of civilian federal service, he becomes unable, because of disease or injury, to render useful and efficient service in his current position or in any other position in the same agency at the same grade or pay level for which he is qualified for resassignment. 5 U.S.C. § 8337(a) (1994); *Burns v. Office of Personnel Management*, 58 M.S.P.R. 688, 691 (1993); 5 C.F.R. § 831.502(a) (1995). Mr. Young,

without dispute, meets the five-year eligibility requirement for disability.

The parties stipulated that Mr. Young has a disabling condition. OPM attempted to accommodate Mr. Young's condition. It offered Mr. Young several reassignments at the same grade and pay level with less environmental disturbances. Mr. Young found all of these reassignments unsatisfactory. He provided evidence that these new assignments had environmental conditions that were not conducive to his medical condition. He also testified that he often fell asleep at these new assignments due to medication.

Mr. Young requested an office position with no technician-type duties and with a controlled environment. OPM then offered Mr. Young a production comptroller position that required no technician-type work. The duties of this position involved processing paper work in an air-conditioned office environment and monitoring work in different buildings. Mr. Young declined this position and never reported for work. He

believed the chemicals in the facility under the office area would permeate the rest of the building. He also testified that requiring him to go from building to building would subject him to changes in his environment. Mr. Young stated that he knew some of the buildings had chemical odors, dusty areas, and high humidity. He did not attempt to fill this position and did not provide proof of these statements regarding the position. The Board found Mr. Young rejected this position because he feared falling asleep due to his medication.

The issue reviewed by the Board was whether Mr. Young's medical condition could be and had been accommodated. The Board found the OPM reasonably accommodated Mr. Young's disability. Thus, the Board held that Mr. Young failed to prove that he was entitled to disability retirement benefits.

This court must affirm the Board's decision unless it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3)

unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1994). In voluntary disability retirement decisions the factual underpinnings are not subject to judicial review. This court is only permitted to determine whether there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 791 (1985); *Smith v. Office of Personnel Management*, 760 F.2d 244, 246 (Fed. Cir. 1985).

Mr. Young cites several letters from physicians and argues that the determination of OPM and the Board was not based on a preponderance of the evidence. He further argues that OPM did not reasonably accommodate his disability. Therefore, he claims he should be entitled to disability retirement benefits. However, Mr. Young's factual allegations fall outside this court's limited review.

An appellant has the burden of proving entitlement to disability retirement by a preponderance of the evidence. *Chavez*

v. Office of Personnel Management, 6 M.S.P.R. 404, 417 (1981). Where the evidence establishes that an employee is unable to perform the regular duties of his position, he should not be retired on disability if the disability could reasonably be accommodated. *Malan v. Department of Air Force*, 55 M.S.P.R. 283, 294 (1992).

The Board found that the agency reasonably accommodated Mr. Young by attempting to assign him to an air-conditioned work area in which the environmental factors could reasonably be controlled. Hence, the Board found that Mr. Young failed to prove by a preponderance of the evidence that he was entitled to disability retirement benefits. On this court's limited review, the decision of the Board must be affirmed.

Appendix B—Order of the United States of America

Merit Systems Protection Board

Philadelphia Regional Office

Dated June 15, 1995

JOHN A. YOUNG)

Appellant,) Case No.

OFFICE OF PERSONNEL) PH-831E-94-0516-I-1

MANAGEMENT)

Agency.

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on February 27, 1995, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201-115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

FOR THE BOARD: Robert E. Taylor

Clerk of the Board

Appendix C—Order of the United States of America

Merit Systems Protection Board

Philadelphia Regional Office

Dated February 27, 1995

JOHN A. YOUNG	}	
Appellant,	}	Case No.
OFFICE OF PERSONNEL	}	PH-831E-94-0516-I-1
MANAGEMENT	}	
Agency	}	

INITIAL DECISION

INTRODUCTION

On June 30, 1994, John A. Young timely appealed from the June 7, 1994 reconsideration decision of the Office of Personnel Management (hereinafter OPM) which affirmed its earlier denial of his application for a disability retirement annuity. The Merit Systems Protection Board (Board) has jurisdiction in this appeal pursuant to 5 U.S.C. § 8347(d) and 5C.F.R. § 831.110(1994).

Pursuant to the appellant's request, a hearing was held in Norfolk, Virginia. For the reasons set forth below, the agency action is AFFIRMED.

ANALYSIS AND FINDINGS

John A. Young was a CS-10 Engineering Technician prior to appellant's April 26, 1993 application for disability retirement, he has chronic sinusitis and allergic rhinitis which is affected by changes in the environment, fumes from spray paints, adhesives, and other chemicals. He claimed that the different types of antihistamines and decongestants that he is required to take to control his medical condition causes drowsiness and lack of concentration which adversely affects his ability to perform his duties as an engineering technician. Appeal File (AF), Tab 5; Agency File, Tab D.

In a September 30, 1993 initial decision letter, the OPM notified the appellant that he was not eligible for disability retirement benefits based on the medical evidence he submitted to support his application. *Id.* at Tab C. The appellant requested

reconsideration of OPM's initial decision. *Id.* at B. On June 7, 1994, the OPM issued a reconsideration decision in which it noted that after reviewing the appellant's original file and considering the new documentation accompanying his reconsideration request, it was sustaining its earlier determination that the appellant was not disabled for useful and efficient service. *Id.* at A.

Burden of Proof

An employee qualifies for disability retirement if, upon completion of at least five years of civilian federal service, he becomes unable, because of disease or injury, to render useful and efficient service in his current position, or in any other position for which he qualifies and to which he can be reassigned. 5 U.S.C. § 8337(a). There is no dispute that the appellant meets the five-year eligibility requirement for disability.

The appellant has the burden of proving by preponderant evidence that he is entitled to disability retirement. *Chavez v. Office of Personnel Management*, 6 M.S.P.R. 404, 417 (1981).

Although the appellant need not establish that he is totally helpless to be considered disabled, *Bauman v. Office of Personnel Management*, 42 M.S.P.R. 257, 259 (1989), he must show that because of disease or injury he is unable to render useful and efficient service as an engineering technician, and that in all probability, the condition will continue for at least one year. See 5 U.S.C. § 8337(a); *Winslett v. Office of Personnel Management*, 30 M.S.P.R. 293, 295 (1986); *McCoy v. Office of Personnel Management*, 28 M.S.P.R. 185, 187 (1985); 5 C.F.R. § 831. 502 (1994).

A disability retirement claim must be based upon the probative value of all the evidence, taking into account the following elements of proof: (1) Objective Clinical findings; (2) diagnosis and expert medical opinions; and (3) subjective evidence of pain and disability together with (4) all evidence relating to the effect of the appellant's condition upon his ability to perform in the grade or class of the position he last occupied. *Chavez*, 6 M.S.P.R. at 422-23 (1981).

The evidence

The parties stipulated that the appellant has a disabling medical condition. Hearing Tape (HT) 1, Side A. A stipulation is sufficient to prove the fact alleged. *Swift v. Office of Personnel Management,* 48 M.S.P.R. 441, 445 (1991); 5 C.F.R. § 1201.63 (1994). Moreover, the medical evidence documenting the appellant's condition of chronic sinusitis and allergic rhinitis is extensive. AF Tab 5, Subtab D, see also Tab 10, Appellant's Exhibits S, T, U, V, W, X & Y.

An engineering technician provides technical, mechanical and operational support to aerospace research conducted in the 31 Inch Mach 10 Tunnel and the 14 Inch Mach 6 High Temperature Tunnel of the Experimental Hypersonics Branch, Space Division. As an engineering technician, the appellant worked with the engineering staff, planning and carrying to conclusion complex research projects. The work of an engineering technician is done in a wind-tunnel environment. *Id.* at Tab 5, Subtab D.

The appellant testified that as an engineering technician (tunnel mechanic), he worked in Building 1251. He noted that the environmental factors in the building affected his medical condition. He explained that while working in Building 1251, he experienced breathing difficulties, multiple sinus infections, sneezing, allergic rhinitis, and asthma attacks. He testified that his medical condition flared up as a result of the dust and chemical fumes emanating from adhesives, epoxy, and spray paints. The high humidity in the building and rapid temperature changes while traveling back and forth from the air conditioned tunnels to non-air conditioned work areas aggravated his condition. HT at 1, side A.

In a May 28, 1993 letter, the appellant's treating physician, Dr. Leo R. Carter, advised the agency that the appellant has a long-standing history of allergic rhinitis for which medical and immunotherapy have been unsuccessful. Dr. Carter recommended that the appellant be restricted from an environment in which excessive amounts of toxic fumes/chemicals, dust, and

high humidification are present. IAF at Tab 5, Subtab D. Based on the parties' stipulation, the appellant's medical evidence and his testimony, I find that the appellant's condition restricts his ability to perform his engineering technician duties.

Under OPM's regulations, an employee is entitled to disability retirement if because of disease or injury, he is unable to render useful and efficient service in his current position or in a vacant position in the same agency at the same grade or pay level for which he is qualified for reassignment. *Burns v. Office of Personnel Management,* 58 M.S.P.R. 688, 691 (1993); 5 C.F.R. § 831.502(a) (1994). Reassignment is defined as a change of an employee, while serving continuously within the same agency from one position to another without promotion or demotion. *Id.* However, where the evidence establishes that an employee is unable to perform the regular duties of his position, he should not be retired on disability if the disability could reasonably be accommodated. *Malan v. Department of the Air Force,* 55 M.S.P.R. 283, 294 (1992); *Benjamin v. Office of*

Personnel Management, 45 M.S.P.R. 187, 190 (1990). Because the parties have stipulated that the appellant has a disabling condition, the remaining issue is whether the appellant's medical condition can be accommodated.

Diane E. Forrest, the agency's Disability Program Manager, completed Standard Form 2824D in which she answered that reassignment was not necessary because the appellant's service is fully successful and the appellant has no medical restrictions which prevent him from either performing his critical duties or from attending work altogether. She further described the agency's accommodations efforts by noting that the appellant had been reassigned to Building 1251A, Unitary Wind Tunnel, into an engineering technician position at the same grade, pay level, and tenure as his former position and within the same commuting area. According to Ms. Forrest, the appellant was assigned to an air-conditioned office, and approximately once a day for 15-20 minutes, he is required to check equipment in the basement which is not air-conditioned

but which has less humidity and heat than the outside air. She noted, however, that there are chemicals on the building site which are used less than once a year. However, the building houses a wind tunnel which does not have the fumes that bothered the appellant's condition in the laboratory where he originally worked. Ms. Forrest further stated that when the appellant expressed dissatisfaction with the reassignment to Building 1251A and requested an office position with no technician-type duties and with a controlled environment, he was offered an opportunity to return to his former position but within an air-conditioned laboratory. He declined the new offer. IAF at Tab 5, Subtab D.

Ms. Forrest testified that four attempts were made to accommodate the appellant's condition. She testified that he was reassigned to Buildings 1251A (the wind tunnel), Building 1247B, Building 1267, and Building 1221. Although Ms. Forrest acknowledged that Building 1221 has a small wind tunnel on the side, she specifically testified that when she went

to Building 1221 and she could not detect fumes and dust. She further noted that model airplanes are not painted in the wind tunnel, that the painting and cleaning work is performed before the airplanes are placed in the wind tunnel. HT at 1, Side A.

In order to accommodate the appellant's medical restrictions, Ms. Forrest further explained that the appellant was offered a production comptroller position at the same pay and grade level of his engineering position. Although she had not seen the position description for the comptroller position, Ms. Forrest explained that she works with production comptrollers on a regular basis. She testified that the duties of the position involve processing paper work in an office environment. When Ms. Forrest went to the work site, she could not detect odors or fumes in the work area. Ms. Forrest testified that the appellant rejected the production comptroller position because he feared falling asleep as a result of his sleep problem and the medications that he was taking. *Id.*

The appellant admitted that he was offered several

positions. He testified that he was offered a position in Building 1148 and when he toured the building, he noticed the smell of epoxy. He noted that there was a large build-up of dust and that spray painting was performed in the building even though the building's large roll-up doors were open. He opined that because of the pungent odor of epoxy in the building, he could not work in Building 1148. *Id.* at Side A.

In support of his testimony regarding the environmental conditions in Building 1148, the appellant submitted a sworn affidavit from Walter Fay Presson, an engineering technician, who worked in Building 1148 prior to his retirement in 1993. Mr. Presson averred that many types of plastics, adhesives, and other materials are tested in Building 1148. He stated that the building is dusty and dirty and contains a heavy volume of fumes resulting from spray paints, resin, and other materials. He acknowledged that the temperature and humidity inside the building are inconsistent and the air quality in the building is poor even though the roll-up doors are left open during working

hours. Appellant's Exhibit 2.

The appellant acknowledged that he was offered a position in work control which would have required him to go to different buildings and monitor work being performed. Although he did not know which buildings he would be expected to go to, he testified that he would have to go to laboratory or tunnel-like facilities where most of the work involved chemicals. The appellant concluded that whenever he was in Building 1148 or 1251, he was exposed to environmental conditions which aggravated his medical condition. He noted that going to a different environment such as an air-conditioned room helped to relieve any discomfort that occurred as result of the environment. The appellant did not discuss the production comptroller position with Ms. Forrester. He admitted that he did not accept the position because he feared falling asleep as a result of the medication that he takes for his condition. As to the environmental factors which aggravate the appellant's condition and restrict his ability to perform, the appellant explained that

he believed the chemicals in the tunnel facility under the work control area would permeate the rest of the building. HT at 1, Side A.

An employee whose disability can be reasonably accommodated by the employing agency has not met his burden of establishing entitlement to disability retirement benefits. *Schwaier v. Office of Personnel Management*, 61 M.S.P.R. 49, 53 (1994); *Dec v. Office of Personnel Management*, 47 M.S.P.R. 72, 79, (1991). In this case, I find the agency made several attempts to accommodate the appellant's medical condition by offering to him several positions in different locations which would have been more conducive to the appellant's respiratory problems. The agency attempted to assign the appellant to an air-conditioned workarea in which the environmental factors could reasonably be controlled. There is no evidence that the appellant reported to the work area where the production comptroller position was located. However, he refused to accept the reassignment because he feared falling asleep and he believed

chemicals in a tunnel under the worksite could possibly permeate the work area. Based on the record as a whole, I find that the appellant failed to prove by a preponderance of the evidence that he is entitled to disability retirement benefits. Thus, OPM's reconsideration decision must be affirmed.

DECISION

The agency's reconsideration is AFFIRMED.

FOR THE BOARD:

Wilhelmina Douglas Stevenson

Administrative Judge